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No. 99-564

In The

Supreme Court of the United States

WILLIAM E. BADO,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether observation of a motor vehicle violation for which a citation could be issued is a necessary prerequisite to a valid investigative stop of the motor vehicle.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1257. This Court has no appellate jurisdiction, because the instant petition for *certiorari* is untimely. 28 U.S.C. § 2101(d); SUP. CT. R. 13.

The time to make application for a writ of *certiorari* to review the judgment of a State court in a criminal case is governed by the rules of the Supreme Court. 28 U.S.C. § 2101(d). To timely file a petition for a writ of *certiorari*, the applicable Supreme Court Rule provides ninety days from the date that the highest state court denies discretionary review of the judgment of a lower state court. SUP. CT. R. 13(1). The time begins to run from the date the judgment is entered, and not from the date the order is issued. SUP. CT. R. 13(3).

In this case, the New Jersey Supreme Court denied discretionary review of the Superior Court, Appellate Division's judgment on June 7, 1999, by order dated June 9, 1999. Pet. App., at p. 6a. Therefore, in this case, time to file a petition for a writ of *certiorari* expired on September 5, 1999.

Petitioner's application for the writ was filed on September 30, 1999 and docketed on October 1, 1999. Respondent has not been noticed that petitioner has applied for, nor been granted, any extension of time to file his petition. *Compare* SUP. CT. R. 13(5) *with* SUP. CT. R. 30(4). Because of its untimeliness, it appears the instant petition should not have been filed at all. SUP. CT. R. 13(2).

Respondent requests that the instant petition be dismissed on the ground that this Court is without jurisdiction to entertain it, because petitioner's application is out of time.

CODIFIED LAW INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

U.S. CONST. amend. IV.

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV.

"A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood . . . shall be subject [to the penalties that follow]."

N.J. STAT. ANN. 39:4-50(a) (West 1998).

SUMMARY OF THE ARGUMENT

A sound exercise of discretion requires denial of petitioner's application for a writ of *certiorari*. The petition presents no compelling question. It merely reflects petitioner's disagreement with the state courts' application of a well-settled rule of law to the not-so-peculiar facts of petitioner's case. Petitions of the character presented herein "rarely" are granted. SUP. CT. R. 10. No exception is warranted in the case at bar.

There is a second reason for denying the instant petition: the state courts correctly applied the proper legal standard to the facts of petitioner's case. The patrolman articulated facts that supported an objectively reasonable suspicion that petitioner's faculties were impaired and he was incapable of safe operation of his motor vehicle. The patrolman had thirteen years of law enforcement experience. The incident occurred at approximately two o'clock in the morning. The patrolman observed petitioner inexplicably pause for approximately two minutes in a parking lot with his reverse lamps lit. The patrolman then observed petitioner travel at five to ten miles per hour in a twenty-five mile per hour zone. The patrolman further observed petitioner activate his left turn signal well in advance of actually making the intended turn.

These all are objective manifestations that would lead a reasonable police officer to suspect that petitioner's judgment and perception might be impaired, and control over his vehicle was affected as a consequence. The law in all jurisdictions consistently has so held. Because the stop of petitioner's vehicle was supported by articulable

facts giving rise to an objectively reasonable suspicion, the stop was constitutionally valid. The petition for a writ of *certiorari* should be denied.

LEGAL ARGUMENT

Petitioner's argument in support of his petition for a writ of *certiorari* is essentially twofold. First, petitioner points out that none of the articulable facts that the police officer identified as supportive of his suspicion would constitute a basis for issuing a motor vehicle violation. In other words, none of petitioner's acts, in and of themselves, were unlawful. Pet. Brief, at pp. 6-7. Petitioner thus contends that, because none of his acts were independently unlawful, there was no basis upon which reasonable, articulable suspicion could be found to justify an investigative stop.

Second, drawing from this premise, petitioner deduces that New Jersey must be applying a subjective legal standard to measure the constitutionality of motor vehicle stops. Pet. Brief, at p. 6. Petitioner reasons that, if the officer did not observe him violating law but the stop nonetheless was upheld, then the court must have been relying on the officer's subjective view of the events to deem the stop reasonable. Pet. Brief, at p. 5. Utilization of this subjective analysis, petitioner argues, is contrary to the objective standard this Court announced in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), and it requires corrective intervention by this Court by virtue of granting petitioner a writ of *certiorari*.

As a threshold matter, respondent objects to petitioner's characterization of New Jersey law as approving a subjective standard for evaluating reasonable, articulable suspicion. *Cf.* SUP. CT. R. 15(2).

In *State v. Thomas*, 542 A.2d 912 (N.J. 1988), the New Jersey Supreme Court explicitly adopted the objective standard set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), as governing investigative stops in this State. *See also State v. Citarrella*, 712 A.2d 1096, 1099-1100 (N.J. 1998); *State v. Arthur*, 691 A.2d 808, 810 (N.J. 1997). This objective standard was applied to the facts of petitioner's case. *See* Pet. App., at p. 2a (following *State v. Williamson*, 650 A.2d 348 (N.J. 1994), which, at *id.* 350, ordered a remand to determine "whether the trooper had an objective basis to believe that a traffic violation occurred."). The New Jersey courts thus were applying the objective standard for adjudging reasonableness, *i.e.*, they were following a correctly stated rule of law.

To argue nonetheless that New Jersey is utilizing a subjective standard to assess reasonable suspicion, petitioner emphasizes the fact that Patrolman Rossbach "did not articulate any inferences which he drew which might have lead (sic) him to believe that the defendant might be intoxicated." Pet. Brief, at p. 5. Petitioner notes that the courts articulated reasonable inferences that could be drawn from the facts of his case, but contends that the law required Patrolman Rossbach first to articulate those inferences.

Petitioner's argument is legally unsubstantiated. First, as a general matter, a police officer's particular, subjective thought processes are not relevant, let alone

necessary, in determining whether a search or seizure was reasonable. *United States v. Whren*, ___ U.S. ___, 116 S.Ct. 1769 (1996). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action." *Id.* at 1774 (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723 (1978)).

Second, there is nothing to suggest that the New Jersey courts merely "adopted" Rossbach's determination that the stop of petitioner's vehicle was reasonable under the circumstances – not because of his "experience" or otherwise. Rather, the courts' analyses reflect that they reviewed the objective facts that Rossbach articulated; they gave proper weight to the inferences that a reasonable patrolman could draw from those facts in light of thirteen years of law enforcement experience; and, they then independently decided whether such facts and inferences supported an objectively reasonable suspicion. *See* Pet. App., at pp. 3a, 5a, 10a-12a. This analysis was consistent with this Court's recent opinion in *Ornelas v. United States*, ___ U.S. ___, 116 S.Ct. 1657 (1996). It in no sense adopted or utilized a "subjective standard" to assess reasonable suspicion.

Petitioner's contention that New Jersey applies a subjective standard is wrong. Thus, his argument focuses not on an erroneously stated rule of law, but on a correctly stated rule's application to the particular facts of his case. His petition does not present a substantial question and should be denied. *Compare* SUP. CT. R. 10(c) *with* SUP. CT. R. 10, ¶ 2 ("A petition for a writ of *certiorari* is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the New Jersey courts properly applied the correct law to the particular facts of defendant's case. That the courts' analyses and judgments are correct is a second reason that a writ of *certiorari* should be withheld.

A traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395-96 (1979). Because a traffic stop is a more limited seizure, however, it is more like an investigative detention than a custodial arrest, and the analysis set forth in *Terry v. Ohio*, *supra*, applies. *See Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3149-50 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582 (1975).

Terry requires that a police officer have a reasonable suspicion, based on articulable facts, that criminal activity is afoot. 392 U.S. at 29, 88 S.Ct. at 1884-85. Reasonable suspicion is "a particularized and objective basis for suspecting the person stopped of criminal activity." *Ornelas v. United States*, *supra*, ___ U.S. at ___, 116 S.Ct. at 1661 (internal quotation omitted). It requires that the officer "be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 2416 (1990). The quantum of articulable suspicion that is required is less than that required for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585 (1989).

Courts assessing the validity of a *Terry* stop must consider the totality of the circumstances. *United States v.*

Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695 (1981). In determining whether the officer's actions were reasonable, it is appropriate to consider "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, *supra*, 392 U.S. at 27, 88 S.Ct. at 27. Significantly, the "totality of the circumstances" may be based entirely on lawful conduct, for a combination of potentially innocent factors can alert the trained eyes of a police officer to illegal activity. *United States v. Sokolow*, *supra*, 490 U.S. at 9, 109 S.Ct. at 1586; *see also United States v. Sharpe*, 470 U.S. 675, 682 n.3, 105 S.Ct. 1568, 1573 n.3 (1985).

The "sole issue" that the New Jersey Superior Court, Appellate Division decided was "whether Patrolman Rossbach had an articulable basis for a reasonable suspicion that [petitioner] was driving while intoxicated." Pet. App., at p. 3a.

New Jersey's drunk driving statute proscribes operation of a motor vehicle while under the influence of intoxicating liquor. N.J. STAT. ANN. 39:4-50(a) (West 1998). As a matter of state law, "[u]nder the influence" is defined as "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on a highway." *State v. DiCarlo*, 338 A.2d 809, 813 (N.J. 1975); *see State v. Johnson*, 199 A.2d 809, 819-20 (N.J. 1964).

To conduct a constitutionally valid motor vehicle stop for violation of N.J. STAT. ANN. 39:4-50(a), therefore, the totality of the facts must support an objectively reasonable suspicion that the driver's impairment of

judgment or control renders improper his operation of a vehicle on the roadways.

The primary ground upon which petitioner contends his stop was invalid is that the officer did not observe him commit a motor vehicle violation. However, consistent with *Sokolow*, observation of decidedly unlawful conduct would not be a necessary prerequisite to a valid investigative stop, so long as the totality of the circumstances otherwise led the objectively reasonable police officer to suspect petitioner was operating his vehicle while intoxicated.

Numerous courts have so held specifically in the context of motor vehicle stops. *See e.g., Hamman v. State*, 883 P.2d 994, 995 (Alaska App. 1994) ("[I]t was not necessary for [the defendant] to violate a traffic law before stopping him. A police officer need not 'see the person he ultimately stops *do* something dangerous . . . It is sufficient if the officer observes facts which lead him to reasonably believe that the person to be stopped *is* dangerous.' ") (quoting *State v. Moran*, 667 P.2d 734, 736 (Alaska App. 1983) (emphasis in original)); *State Dep't of Highway Safety v. DeShong*, 603 So.2d 1349, 1352 (Fla. App. 1992) ("Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop."); *Brown v. State*, 595 So.2d 270, 270 (Fla. App. 1992) (upholding stop for suspected DUI, and indicating "It is true that apparently no traffic offense was involved. However, the absence of such an offense does not establish the absence of a valid objective basis for the stop."); *State v. Field*, 847 P.2d 1280, 1285 (Kan. 1993) (stating that "There is no requirement that the officer actually observe a traffic violation being committed" to legally stop a vehicle for

suspected DUI); *see also Ebona v. State*, 577 P.2d 698, 701 n.12 (Alaska 1978) (deeming lawful stop to investigate suspected DUI while acknowledging the officer did not observe violation of any traffic rules and the motorist did successfully make two correct turns); *Davis v. State*, 923 S.W.2d 781, 784, 788 (Tex. App. 1996) (upholding stop for suspected DUI while noting the officer observed "no specific traffic violation"), *rev'd on o.g.*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997).

Thus, observation of a traffic violation for which a citation could have been issued was not indispensable to execution of a lawful stop of petitioner's vehicle. Further, the investigative stop of petitioner's vehicle was constitutional, because the totality of the facts articulated by Officer Rossbach supported an objectively reasonable suspicion that petitioner was operating his vehicle under the influence of an intoxicant.

First, petitioner was driving his vehicle at or around 2:00 or 2:30 in the morning at the time his unusual driving was observed and he ultimately was stopped. Pet. App., at pp. 3a, 10a.

In evaluating the reasonableness of an investigative stop for DUI, courts recognize that the lateness of hour is a relevant factor that should be considered among the totality of the circumstances, because "intoxicated drivers are more likely to be on the road at such an hour." *Hamman v. State, supra*, 883 P.2d at 995 (3:00 a.m.); *see Piercefield v. State*, 871 S.W.2d 348, 351 (Ark. 1994) ("lateness of hour"); *Edwards v. State*, 464 S.E.2d 851, 857 (Ga. App. 1995) (a little before midnight); *State v. Cusack*, 649 A.2d 16 (Me. 1994) (just prior to 3:00 a.m.); *Davis v. State, supra*, 923 S.W.2d at 784, 788 (1:00 a.m.).

Second, Patrolman Rossbach's attention initially was drawn to petitioner's vehicle, because petitioner had put his car in reverse in a parking lot, but then remained motionless for approximately two minutes before backing his vehicle out of the parking spot. Pet. App., at pp. 3a, 10a. Patrolman Rossbach subsequently observed petitioner activate his left-hand signal well in advance of actually making the intended left turn. Pet. App., at pp. 3a, 10a.

A motorist's unusual or delayed responses in operating his vehicle are articulable indicia supportive of an objectively reasonable suspicion that the motorist is intoxicated or otherwise impaired. *See, e.g., United States v. Rehkop*, 96 F.3d 301, 305 & n.5 (8th Cir. 1996) (remaining stationary through three rotations of traffic light deemed legitimate, objective factor supporting suspicion of DUI); *see also People v. Christie*, 520 N.W.2d 647, 648-49 (Mich. App. 1994) (activating turn signal prematurely (0.2 of a mile before making turn) objectively indicated that the driver could be under the influence of intoxicants); *cf. United States v. Lee*, 73 F.3d 1034, 1038 (10th Cir. 1996) (straddling center line for 100 to 150 feet (*i.e.*, one second) before proceeding into right lane deemed legitimate, objective factor supporting the suspicion that the driver was intoxicated).

Third, Patrolman Rossbach observed petitioner driving at an excessively slow speed: five to ten miles per hour in a twenty-five mile per hour zone. Pet. App., at pp. 3a, 10a.

Operation of a vehicle at an unusual or erratic speed has been held an objective, legitimate ground supportive

of a reasonable suspicion that the motorist is intoxicated or otherwise impaired. *See, e.g., Brown v. State, supra,* 595 So.2d at 270 (slowing to 45 mph, then accelerating to 55 mph held supportive of reasonable suspicion); *State Dep't of Highway Safety v. DeShong, supra,* 603 So.2d at 1352 (slowing from 55 mph to 30 mph, then accelerating again held supportive of reasonable suspicion).

More specifically, it uniformly has been recognized that traveling at an inordinately slow rate of speed is an objective factor upon which reasonable suspicion of driving under the influence could be based. *See, e.g., United States v. Banks,* 971 F. Supp. 992, 993, 996 (E.D. Va. 1997) (driving 5 to 7 miles per hour below posted speed limit); *United States v. Higareda-Santa Cruz,* 826 F. Supp. 355, 356, 358 (D. Or. 1993) (driving 40 to 45 mph in a 55 mph zone); *Bailey v. State,* 319 So.2d 22, 26 (Fla. 1975) (traveling at a "slow rate of speed"); *Edwards v. State,* 464 S.E.2d 851, 857 (Ga. App. 1995) (traveling 45 mph in a 65 mph zone); *Sell v. State,* 496 N.E.2d 799, 800 (Ind. App. 1986) (traveling 35 to 40 mph in a 55 mph zone for two to three minutes, backing up traffic); *State v. Cusack,* 649 A.2d 16 (Me. 1994) (driving 15 mph below posted speed limit); *State v. Ratliff,* 728 P.2d 896, 899 (Or. App. 1986) (driving 20 to 25 mph in a 55 mph zone), *aff'd,* 744 P.2d 247 (Or. 1987); *State v. Brothers,* 828 S.W.2d 414, 416 (Tenn. Cr. App. 1991) (driving 10 mph under speed limit); *Freeman v. Commonwealth,* 460 S.E.2d 261 (Va. App. 1995) (traveling 10 to 15 mph below posted limit).

Additionally, courts have opined that a motorist's maintenance of erratic or excessively slow speeds could be an objective indicator of his or her "consciousness of guilt" and desire to avoid apprehension by the police. *See*

United States v. Romulus, 949 F.2d 713, 717 (4th Cir. 1991) (hitting brakes upon observation of police vehicle, plus continued slowing to avoid passing police car, supported independent basis for suspecting driver was intoxicated or unlicensed); *State v. Ratliff, supra*, 728 P.2d at 898-99 (discussing "drive/stop/proceed" pattern drunk drivers utilize when they are aware of a police vehicle on the road, in order to avoid being apprehended). *Compare* Pet. App., at p. 5a (holding that the factors relied upon by Patrolman Rossbach provided an objectively reasonable basis for suspecting "that [petitioner's] driving was unusually hesitant and excessively cautious because [petitioner] was aware that his ability to drive safely had been impaired by alcohol.").

Finally, Patrolman Rossbach had thirteen years of law enforcement experience as of the time he made the observations of defendant's vehicle operation and determined an investigative stop was justified in light of the circumstances. Pet. App., at p. 5a.

Courts have emphasized a respective police officer's experience when they assess the totality of objective facts known to the officer and evaluate the "inferences and deductions" such a trained officer could draw from those facts. *United States v. Cortez, supra*, 449 U.S. at 418, 101 S.Ct. at 695. Applying this principle in the specific context of motor vehicle stops for suspected DUI, see *Hamman v. State, supra*, 883 P.2d at 995; *Brown v. State, supra*, 595 So.2d at 270; *State v. Field, supra*, 847 P.2d at 1285; *State v. Ratliff, supra*, 728 P.2d at 898-99; *Freeman v. Commonwealth, supra*, 460 S.E.2d at 262. *See also State v. Brothers, supra*, 828 S.W.2d at 416 (noting fact that defendant was driving ten miles below the speed limit and

emphasizing the officer's experience, as reflected by his testimony that, "a lot of people under the influence of some type of intoxicant, this is what you look for.").

Thus, each of the facts Patrolman Rossbach articulated were legitimate and have been relied upon by courts around the country in assessing the objective reasonableness of motor vehicle stops for suspected DUI. Properly, the New Jersey courts considered the totality of those facts, *United States v. Cortez, supra,* 449 U.S. at 417-18, 101 S.Ct. at 695, taken together with the rational inferences that an experienced police officer could draw from them, *United States v. Sokolow, supra,* 490 U.S. at 9, 109 S.Ct. at 1586, to evaluate the reasonableness of the stop. *See* Pet. App., at pp. 5a, 10a-11a.

Upon performing this analysis, the state courts correctly determined that the stop was constitutional, because the facts articulated by Patrolman Rossbach supported an objectively reasonable suspicion that petitioner's judgment and perception were impaired and control over his vehicle was adversely affected as a consequence thereof. "The purpose of an investigative stop is to clarify ambiguous situations." *State v. Cox,* 523 N.W.2d 52, 61-62 (Neb. App. 1994), *aff'd,* 529 N.W.2d 795 (Neb. 1995). The Constitution does not require a police officer who observes signs of impaired driving to wait until the motorist actually endangers the public or himself to perform a stop and ensure that the motorist can proceed in a safe manner. Under these facts, "[i]t would have been poor police work indeed" for a patrolman of thirteen years experience to have failed to investigate further petitioner's capacity to drive safely. *Terry v. Ohio, supra,* 392 U.S. at 22-23, 88 S.Ct. at 1880-81. The stop was valid.

The New Jersey courts applied the correct legal standard, engaged in the correct analysis of the facts consistent with that standard, and arrived at the correct result. There is no substantial question raised by the instant petition for *certiorari*. It is respectfully submitted that said petition should be denied.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, respondent respectfully requests this Court deny petitioner's application for a writ of *certiorari*.

Respectfully submitted,

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